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# The Attorney-Client and Work Product Privileges: The Case for Protecting Internal Investigations on the University Campus

Virginia H. Underwood  
*Eastern Kentucky University*

Richard H. Underwood  
*University of Kentucky College of Law, runderwo@uky.edu*

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## ARTICLES

# The Attorney-Client and Work Product Privileges: The Case for Protecting Internal Investigations on the University Campus

BY VIRGINIA H. UNDERWOOD\*  
& RICHARD H. UNDERWOOD\*\*

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### I. INTRODUCTION

The authors hope to make, or rather to restate, the case for the protection of reports and information generated during internal

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\* EEO Officer, Eastern Kentucky University. B.A. 1973, Berea College; J.D. 1986, University of Kentucky. The views expressed in this Article are those of the authors and do not necessarily reflect those of the institutions with which they are affiliated or employed.

\*\* Spears-Gilbert Professor of Law, University of Kentucky College of Law. B.S. 1969, J.D. 1976, The Ohio State University.



investigations at public colleges and universities. The results of an informal survey of university lawyers and Equal Employment Opportunity ("EEO") officers conducted by one of the authors prior to a presentation at the June, 2000 National Association of College and University Attorneys ("NACUA") Conference<sup>1</sup> suggest that steps routinely are not taken by university counsel and investigators to assert the attorney-client and work product privileges and protect the fruits of internal investigations from disclosure. This seems odd, since the protection of internal corporate investigations has been a priority, and a "hot topic,"<sup>2</sup> ever since the Supreme Court decided *Upjohn Co. v. United States*<sup>3</sup> in 1981. The possibility of using these privileges more aggressively would seem to be all the more important in light of the hostile reception given by the courts and many state legislators to the so-called "self-critical analysis" or "self-evaluative" privileges.<sup>4</sup>

In some cases, it would appear that the possibility of asserting these privileges has not occurred to counsel or to other persons who do workplace investigations. Some counsel seem to assume that unless they do the investigation or witness interviews personally, the privileges will not apply. Sometimes, it is assumed, incorrectly, that communications reporting "factual information" are not protected by the attorney-client or work-product privileges.<sup>5</sup> In other cases, the assumption seems to be that the privileges will always be waived anyway for some tactical reason, such as that the internal investigation will be used as some kind of "affirmative

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<sup>1</sup> This Article is an extension and elaboration of comments made at the conference, and of a summary of ethical considerations in the conduct of internal investigations presented in WILLIAM FORTUNE, RICHARD UNDERWOOD, & EDWARD IMWINKELRIED, *MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK* § 5.14 (Supp. 2d ed. 2001). We would like to thank Professor Edward Brewer, III, Northern Kentucky University Salmon P. Chase College of Law, for reviewing an early draft of this Article and providing valuable suggestions.

<sup>2</sup> For a recent bit of "Analysis & Perspective" on the subject, see the two part study at 16 ABA/BNA LAW. MAN. PROF. CON. 329-42, 376-82.

<sup>3</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>4</sup> See S. Beville May & Kimberly Cozza, *Internal EEO Investigations & Audits: Are They Privileged?*, 629 PLI/LIT 313, 334-35, 340-46 (2000); Gregory J. Wallance & Jay W. Waks, *Internal Investigation of Suspected Wrongdoing By Corporate Employees*, 1165 PLI/CORP 507, 522 (2000). For a good collection of cases and articles on the self-evaluative privilege, see Melissa Tapp, *Roberts v. Hunt: Evaluating the So-Called Self-Evaluative Privilege*, 23 AM. J. TRIAL ADVOC. 471 (1999).

<sup>5</sup> This is one of several misconceptions about the attorney-client privilege held by courts as well as by lawyers. See discussion *infra* notes 27-42.



defense," so there is no reason to "go through the motions" necessary to set up the privileges. Finally, counsel may entertain the assumption that "Open Records" laws will trump any claims of privilege. The authors would like to challenge these assumptions, and discuss the practical steps that should be taken when it has been decided that the privileges are worth claiming.

The authors would also like to address some troubling developments in the way that employment law is actually being practiced. Recently we have heard lawyers on the plaintiff's "side of the v." opine that they no longer need to engage in discovery because they get everything they need from the employer's investigation. Furthermore, if they do not get the result they want, they sue, listing a glittering array of state tort claims such as "negligent investigation," infliction of emotional distress, and tortious interference.<sup>6</sup> Frequently, such elaborate complaints name as additional defendants anyone participating in the investigation as a witness or as an investigator. On the defense "side of the v." we hear equally alarming suggestions that in-house or outside defense counsel may do nothing but sit back and rely on the results of an internal investigation—"The defense rises or falls on the strength of the report." We hope to persuade the reader that these approaches to the practice, on either "side of the v.," are undesirable and wrongheaded, to say the least.

## II. WHAT IS AN INTERNAL INVESTIGATION?

An "internal investigation" is "an investigation by an organization of suspected illegal activity or other misconduct by its officers or employees. The investigation is usually conducted by an attorney . . . who reviews documents, conducts interviews and prepares a report, either written or oral, to the organization."<sup>7</sup> When an employer hires an outside law firm to conduct an internal investigation it is frequently called an "independent investigation."<sup>8</sup> This terminology is most appropriate when the work is being done by someone who is not regular outside counsel, the theory being that the investigator will be more objective<sup>9</sup> and not be affected by his or her prior relationship with the employer or conflict with the complaining or complained of employee.

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<sup>6</sup> For a primer for the plaintiff's bar, see Richard A. Bales & Richard O. Hamilton, Jr., *Workplace Investigations In Kentucky*, 27 N. KY. L. REV. 201 (2000).

<sup>7</sup> Gary G. Lynch, *Internal Investigations*, 1085 PLI/CORP 369, 373 (1998).

<sup>8</sup> See, e.g., Wallance & Waks, *supra* note 4, at 509.

<sup>9</sup> See *id.* at 510.



There are a number of reasons why an organization would want to conduct an internal investigation. Obviously, it is in the best interests of an organization to detect and stop illegal or improper conduct. Just as obvious is the fact that an internal investigation will generate the information and analysis needed for the organization's defense to anticipated civil and criminal charges. In some areas of the law an investigation by the employer may be a prerequisite to the assertion of some sort of special "affirmative defense."<sup>10</sup> In some areas of the law, regulatory authorities may have imposed an independent obligation on the employer to conduct an internal investigation of reported wrongdoing.<sup>11</sup> Corporate compliance programs help assess the cost-benefit of disclosing wrongdoing to the government.<sup>12</sup> The Federal Organizational Sentencing Guidelines, which became effective in 1991, provide for more lenient sentences for corporate offenders which,

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<sup>10</sup> See *infra* notes 105-114 and accompanying text for a discussion of the special affirmative defense to vicarious liability for sexual harassment recognized by the United States Supreme Court in *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

<sup>11</sup> The Equal Employment Opportunity Commission ("EEOC") has gone further than *Faragher* and *Ellerth*, and concluded that the analysis of those cases, and the employer's duty to investigate, apply to cases involving harassment based on race, color, religion, or national origin. See 29 C.F.R. § 1604.11 n.1 (2001). Furthermore, the written policies of many educational institutions mandate that the EEO officer investigate allegations of sexual harassment. See Stephen S. Dunham, *Case Studies of Wrongdoing on Campus: Ethics and the Lawyer's Role*, 19 J.C. & U.L. 315, 325-26 (1993). The Sixth Circuit applies *Faragher* and *Ellerth* in cases of alleged racial harassment, *Allen v. Michigan Department of Corrections*, 165 F.3d 405, 411 (6th Cir. 1999), and in cases involving alleged religious discrimination, *Hafford v. Seidner*, 167 F.3d 1074, 1080-81 (6th Cir. 1999). Why not apply *Faragher* and *Ellerth* in cases involving discrimination on the basis of national origin, *Roderiquez v. Kantor*, 162 F.3d 1155 (4th Cir. 1998), or age, *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151 (8th Cir. 1999)? See also Stuart M. Gerson & Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law*, 51 ALA. L. REV. 163 (1999); Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care Organization*, 51 ALA. L. REV. 205 (1999); Edward N. Stoner II & Catherine S. Ryan, *Burlington, Faragher, Oncale, and Beyond: Recent Developments in Title VII Jurisprudence*, 26 J.C. & U.L. 645, 650 (2000) (citing *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998), *reh'g en banc granted and opinion vacated by* 169 F.3d 215 (5th Cir. 1999), *opinion reinstated on reh'g by* 182 F.3d 333 (5th Cir. 1999), *remanded by* 188 F.3d 278 (5th Cir. 1999)); J. Mark Waxman et al., *Disclosure Requirements and Responsibility of Counsel*, SE34 ALI-ABA 21 (1999).

<sup>12</sup> See generally Lynch, *supra* note 7, at 375.



at the time of the offense, had implemented an "effective program to prevent and detect violations of law."<sup>13</sup> Finally, the efforts of a corporation or entity to clean up such problems on its own may be good business and good public relations.<sup>14</sup> This may be a particularly important consideration for an academic institution, because faculty and students would presumably prefer, indeed insist, that their institution follow a policy of open and aggressive correction of wrongdoing and improper conduct, such as racial discrimination and sexual harassment.

### III. WHAT DID *UPJOHN* SAY ABOUT INTERNAL INVESTIGATIONS?

In 1981, the Supreme Court of the United States decided the case of *Upjohn Co. v. United States*.<sup>15</sup> In this case the Court provided much needed clarification of the scope of the corporate attorney-client privilege under federal evidence law. The case arose out of an internal investigation of suspected "questionable" and "possibly illegal" payments by one of Upjohn's foreign subsidiaries to foreign government officials in order to secure foreign government business<sup>16</sup> (such payments are a problem under the Foreign Corrupt Practices Act). The Chairman of Upjohn requested the company's general counsel to conduct an investigation with the aid of outside counsel. As part of the investigation, the Chairman issued a letter to "All Foreign General and Area Managers" instructing them to provide detailed information concerning such "questionable payments" to general counsel (by completing a confidential questionnaire).<sup>17</sup> The managers were instructed to treat all such information as highly confidential and not to discuss the investigation with anyone other than Upjohn employees who might be of assistance in providing the necessary information. Counsel also interviewed the managers who provided questionnaires, and interviewed thirty-three other Upjohn employees or officers. Later, when Upjohn submitted required reports to the SEC and the IRS disclosing "questionable payments," the IRS issued a summons demanding all of the questionnaires.<sup>18</sup> The company declined to produce the materials on the ground that

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<sup>13</sup> See Gregory J. Wallance, *Corporate Compliance Programs Under The Organizational Sentencing Guidelines*, 1165 PLI/CORP 9, 11 (2000).

<sup>14</sup> See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1382-92 (1999).

<sup>15</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>16</sup> *Id.* at 386-87.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 387-88.



they were communications to counsel within the attorney-client privilege.<sup>19</sup> The lower court and the Sixth Circuit Court of Appeals opined that the materials sought were not within the privilege because they were not communications from person's within a "control group"—persons sufficiently high up in the corporate chain to be deemed the "client."<sup>20</sup> However, the Supreme Court rejected this "control group" test, opining that an employee's status in the corporate hierarchy does not determine whether a communication is privileged, noting that:

Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if [counsel] is adequately to advise the client with respect to such actual or potential difficulties.<sup>21</sup>

...

The communications at issue were made by Upjohn employees to counsel for Upjohn [or representatives of counsel] acting as such, at the direction of corporate superiors in order to secure legal advice from counsel . . . . Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with . . . laws, . . . regulations, duties to shareholders, and potential litigation in each [of the relevant] areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. . . . Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made . . . and have been kept confidential by the company. Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.<sup>22</sup>

It is important to note all of the preconditions mentioned in this passage—(1) communication to counsel or counsel's representative, (2) from a corporate employee, (3) concerning a matter within the scope of his or her employment and involving information that is presumably not available

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<sup>19</sup> *Id.* at 388.

<sup>20</sup> *Id.* at 388-89.

<sup>21</sup> *Id.* at 391.

<sup>22</sup> *Id.* at 394-95 (emphasis added).



from upper management, (4) made at the direction of the employee's corporate superiors so that the corporation can get legal advice, (5) the employee is aware of the purpose and the need for confidentiality, and (6) the communication is confidential when made and kept confidential. Of course, if any of these prerequisites is not satisfied, there is some risk that a claim of privilege will fail.<sup>23</sup>

It is now well established that the privilege applies to materials generated by employees acting at the request of in-house counsel as well as outside counsel, although ambiguities regarding the role that in-house counsel played in particular scenarios has allowed for some rather stingy judicial interpretations of the privilege from time to time. In 1997, the ABA House of Delegates passed a resolution of support for the common understanding that "the attorney-client privilege for communications between in-house counsel and their clients should have the same scope and effect as the attorney-client privilege for communications between outside counsel and their clients."<sup>24</sup> The hope was that this might clear up the judicial confusion,<sup>25</sup> and shore up the privilege against "erosion."<sup>26</sup>

#### IV. WHAT EXACTLY IS PROTECTED?

The authors looked for state and federal cases interpreting *Upjohn* and discovered that there is a lot of confusion as to what, exactly, is covered by these privileges. Indeed, there is so much confusion that Professor Paul Rice of American University was able to generate a substantial law review article discussing persistent misconceptions about the attorney-client privilege.<sup>27</sup> The most important point he makes in his excellent article is

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<sup>23</sup> Wallance & Waks, *supra* note 4, at 516.

<sup>24</sup> See Carole Basri, *Confidentiality of Communications*, 1165 PLI/CORP 481, 488-89 (2000) (citing Recommendation to ABA House of Delegates (Aug. 1997)).

<sup>25</sup> See Amber Stevens, Comment, *An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*, 23 HAMLINE L. REV. 289 (1999) (analyzing the uncertainty and ambiguity resulting from courts' disparate treatment of the issue).

<sup>26</sup> See Stuart M. Gerson & Jennifer E. Gladieux, *Advice of Counsel: Eroding Confidentiality In Federal Health Care Law*, 51 ALA. L. REV. 163 (1999); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147 (2000).

<sup>27</sup> See Paul R. Rice, *Attorney-Client Privilege: Continuing Confusion About Attorney Communications, Drafts, Pre-Existing Documents, and the Source of the Facts Communicated*, 48 AM. U. L. REV. 967 (1999).



that many courts have been persuaded, wrongly, that "a client's [or a client employee's] communication of non-confidential information precludes the communication [incorporating that information] from being confidential."<sup>28</sup> As we have seen in our discussion of *Upjohn*, communications to corporate counsel or his or her representatives made in order for the corporation to obtain legal advice are privileged, regardless of the nature or source of the facts and information included. While it is true that the facts are not protected, in the sense that opposing counsel can ask witnesses about those facts either in his or her own discovery or investigation (facts do not become "off-limits" just because they were reported to counsel), opposing counsel must do his or her own work.<sup>29</sup> Corporate counsel does not have to turn over materials generated for counsel's use in giving legal advice merely because the information is "factual." In short, the privilege may not protect facts from independent discovery, but the privilege does protect communications of facts. *Upjohn* said so clearly:

The protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communications to his attorney.<sup>30</sup>

To say the same thing another way, if a plaintiff seeks a communication of facts, written or oral, between a corporation's employee and the corporation's attorney (or a representative of that attorney), made to help counsel provide legal services to the corporate client, then the plaintiff is not seeking the facts themselves, but rather is intruding into matters that are privileged.<sup>31</sup> In short, witness statements of fact to counsel and counsel

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<sup>28</sup> *Id.* at 983.

<sup>29</sup> "While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege." *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981).

<sup>30</sup> *Id.* at 395-96 (citing *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

<sup>31</sup> For recent state court decisions getting it right, see *Gordon v. Newspaper Association of America*, No. LF-768-3, 2000 WL 14693 (Va. Cir. Ct. Jan. 5, 2000), modified in other respects at 2000 WL 140602 (Va. Cir. Ct. Feb. 4, 2000) and



notes about factual matters generated during internal investigations of alleged corporate crime, health care fraud and abuse, malpractice, environmental crimes and torts, and *Title VII discrimination, and sexual harassment*,<sup>32</sup> can fall within the attorney-client privilege as well as the work product privilege.<sup>33</sup> The plaintiff may, through his or her own investigation and discovery (*his or her own work*), inquire into the facts known by a witness, but may not have the fruits of opposing counsel's inquiry in the absence of some kind of waiver.<sup>34</sup>

Furthermore, it is important to note that witness statements that are "factual" are also covered by the work product rule.<sup>35</sup> Indeed, the Supreme Court ruled in *Upjohn* that the materials in question were also protected by the work product privilege.<sup>36</sup> Some lawyers and judges appear to operate on

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*Gould v. City of Aliquippa*, 750 A.2d 934 (Pa. Commw. Ct. 2000). For a state supreme court that seems to have gotten it wrong, see *In re Texas Farmers Insurance Exchange*, 12 S.W.3d 807 (Tex. 2000) (strong opinion dissenting from the Texas high court's denial of a petition for mandamus which had sought the reversal of a bizarre ruling of an appellate court to the effect that the privilege does not apply to communications of facts between attorney and client). For other cases that were wrongly decided, see Rice, *supra* note 27.

<sup>32</sup> See Glenn A. Duhl, *Conducting Sexual Harassment Investigations (With Sample Procedures)*, 10 NO. 6 PRAC. LITIGATOR 11, 15-18 (1999) (providing sample procedures for sexual harassment investigations that should preserve the attorney-client and work product privileges).

<sup>33</sup> See *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144 (S.D.N.Y. 1999), discussed *infra* note 130 and accompanying text.

<sup>34</sup> See *Gould*, 750 A.2d at 938.

<sup>35</sup> See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 292-96 (1986). The work product privilege extends to interviews of former employees and non-employee witnesses. Wallance & Waks, *supra* note 4, at 519.

<sup>36</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 397-402 (1981). Work product protection would extend to materials, such as witness statements of fact to counsel or counsel notes, obtained in interviews from former employees as well as present employees—indeed to materials generated from non-client sources. See WOLFRAM, *supra* note 35, at 296. This may make the work product privilege very important in states which limit the *Upjohn* attorney-client privilege to communications from present employees. However, it also should be noted that there are many federal cases extending the rationale of *Upjohn* to include information obtained from former employees as within the attorney-client privilege. See generally CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* 389-90 (2d ed. 1999) (discussing *Upjohn*'s application to former employees); John F. Savarese & Carol Miller, *Protecting Privilege and Dealing Fairly With Employees While Conducting an Internal Investigation*, 1121 PLI/CORP 525 (1999).



the belief that only the opinions or mental impressions of a lawyer are protected by the work product privilege, but this is certainly not the case.<sup>37</sup> While it is true that opinions and mental impressions are entitled to a higher level of protection than "factual" material, perhaps even absolute protection,<sup>38</sup> other work product is discoverable only upon a showing of substantial need and that the party seeking such material is unable, without undue hardship, to obtain their substantial equivalent.<sup>39</sup> Furthermore, the Supreme Court in *Upjohn* ruled that counsel notes and memoranda of witnesses' oral statements should rarely be produced because they necessarily tend to reveal counsel's mental impressions.<sup>40</sup> An often overlooked ruling in the opinion was that the magistrate in the lower court had erred in applying the Rule 26 "substantial need" and "undue hardship" standard.<sup>41</sup> Instead, counsel notes and memoranda of witness's oral statements are "deserving [of] special [higher] protection."<sup>42</sup> Absent waiver, such materials are not the plaintiff's simply for the asking, or simply because discovery of them would save the plaintiff time and money.

Finally, while it is true that work product protection is available only for materials prepared in "anticipation of litigation,"<sup>43</sup> the Second Circuit held that a document is prepared "in anticipation of litigation" and is work product if it was prepared "because of" existing or expected litigation; it need not have been prepared "primarily to assist in" the litigation.<sup>44</sup>

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Professor Edward Brewer, see *supra* note 1, also advises that the work product privilege is particularly important in states that reject *Upjohn* and limit the attorney-client privilege to the "control group." Professor Brewer also recommends that in such states the control group should be interviewed first.

<sup>37</sup> See Wallance & Waks, *supra* note 4, at 519.

<sup>38</sup> See WOLFRAM, *supra* note 35, at 293.

<sup>39</sup> See FED. R. CIV. P. 26 (b)(3).

<sup>40</sup> *Upjohn*, 449 U.S. at 399-401.

<sup>41</sup> *Id.* at 401.

<sup>42</sup> *Id.* at 400. What if counsel uses a stock list of questions as a sort of standing operating procedure? Could opposing counsel contend that the questions and answers do not reflect counsel's mental impressions? It seems unlikely that anyone would proceed in such a mechanical and unimaginative way, but presumably counsel would ask follow up questions that would reflect impressions and conclusions. Would opposing counsel have more luck if a non-lawyer were using counsel's stock questions?

<sup>43</sup> *Id.* at 400-01.

<sup>44</sup> *United States v. Aldman*, 134 F.3d 1194, 1197-1203 (2d Cir. 1998). "It is often prior to the emergence of specific claims that lawyers are best equipped either to help clients avoid litigation or to strengthen available defenses should litigation occur." Savarese & Miller, *supra* note 36, at 543. So the lack of a specific claim



Statements and other material generated in an investigation should be protected if they were generated to advise an employer about potential liability or to assist counsel in making recommendations about improved compliance, as well as to assist counsel in defending an anticipated claim.

#### V. WHAT KIND OF GROUNDWORK IS INVOLVED IF THE PRIVILEGE IS TO BE PRESERVED? WHAT ARE THE MECHANICS?

The language of *Upjohn*, set out above, provides us with a checklist to follow during an investigation.<sup>45</sup>

(1) There should be a directive from higher authority authorizing an investigation. For example, in corporate investigations there may be a board resolution or at least a letter from the CEO to the general counsel authorizing the investigation.<sup>46</sup> Although it is unclear whether a standing order from a university president or chancellor to general counsel, setting forth procedures to be followed in certain types of cases, such as claims of sexual harassment or other discrimination, would also suffice, it is our opinion that it would.

(2) The purpose of the investigation should be documented in the file. For example, it should be made clear that more than a fact investigation is being conducted. It should be stated that the purpose of the investigation is to obtain information for counsel so that he or she can advise the employer regarding potential liability, and to defend in any potential or anticipated litigation, and to make recommendations for improved compliance in the future. The directive should allude to all possible litigation. These recitals will support a claim that the material generated in the investigation was generated "in anticipation of litigation" for purposes of the work product doctrine. However, if counsel is sending pre-interview letters to employees (particularly letters to "non-control group" employees in states that do not

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should not preclude the availability of the work product privilege. *See id.*

<sup>45</sup> The checklist that follows is suggested by Waxman et al., *supra* note 11, at 35-40. See also Peter M. Panken & Barbara Ann Sellinger, *The Attorney-Client Privilege and Work Product Doctrine*, SE42 ALI-ABA 519 (1999) for a particularly useful set of guidelines ("twelve rules to follow in conducting an internal investigation," plus useful form letters including a "request for authorization to conduct an internal investigation," a letter from management or "authorization for an internal investigation," and a "memorandum to employees advising them of the investigation").

<sup>46</sup> For a collection of form letters that might be used at various stages of an internal investigation, see Edward C. Brewer III, *The Ethics of Internal Investigations in Kentucky and Ohio*, 27 N. KY. L. REV. 721, 806-39 (2000).



follow *Upjohn*), one may wish to exercise some caution in explaining the nature and scope of potential litigation in such letters.

(3) Organize the investigation with a view to protecting the attorney-client and work product privileges by:

(a) Marking all communications as "Attorney-Client Privileged" and "Work Product."

(b) Beginning all employee interviews with "*Upjohn* warnings" so that the interviewee understands that counsel or counsel's representative represents the employer corporation (or University) and not the employee; that the interview is being done to help counsel provide legal advice to the employer corporation (or University); that the information will initially be treated as confidential, but that any privilege belongs to the employer corporation (or University) and may be waived by the employer; that the interviewee should not discuss the interview or discussions with anyone;<sup>47</sup> and that the interviewee may want to have his or her own counsel in appropriate cases.<sup>48</sup> The authors suggest putting these warnings right at the top of any outline prepared for use during the interview. This serves as a reminder to give the warnings, and also serves to document the fact that the warnings were given. When a witness statement is taken, or when a

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<sup>47</sup> There are practical and ethical limits on counsel's ability to control an employee's ability to interview or discuss the information with anyone. Aside from the legal question of the extent to which the employer can demand cooperation from its employees, there is also the ethical dimension alluded to in *Model Rule of Professional Conduct* 3.4(f), which provides:

A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless: the person is . . . an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

MODEL RULES OF PROF'L CONDUCT R. 3.4(f) (1983). Also, if the employee is separately represented, the employer's counsel must not bypass the employee's lawyer. See Jeffrey D. Wohl, *Ethical Obligations of Employment Lawyers*, 615 PLI/LIT 1033, 1051-58, 1064-65 (1999) (discussing Model Rule 4.2, as well as the problem of joint representation).

<sup>48</sup> For the text of recommended "*Upjohn* Warnings," see Waxman et al., *supra* note 11, at 37-39. See also Savarese & Miller, *supra* note 36, at 555-56 (including model warnings to employees); Wallance & Waks, *supra* note 4, at 511. The D.C. Bar's Legal Ethics Committee has issued a useful ethics opinion, Opinion No. 269, setting forth the ethical "Obligation of [a] Lawyer for [a] Corporation to Clarify [the Lawyer's] Role in [an] Internal Corporate Investigation." It is included as an appendix to Waxman et al., *supra* note 11, at 46-56. Professor Brewer suggests that these setup points may be covered in an introductory letter from counsel.



verbatim record is made before a court reporter, we like to put the warnings at the top of the statement or recite the warnings at the beginning of the transcript. We also document the fact that the interview or statement is in "anticipation of litigation."

(c) Documenting the interviews. Many witness's are uncomfortable about tape recording<sup>49</sup> and in some jurisdictions the work product status of recordings may be in question.<sup>50</sup> Secret tape recording is generally ethically inappropriate, even in states where it is legal.<sup>51</sup> Unless there is some need to pin a witness down or to perpetuate the witness's testimony, the substance of the interviews will usually consist of counsel's (or counsel's representative's) notes<sup>52</sup> as opposed to signed witness statements or transcripts under oath. Many counsel recommend that verbatim transcripts be avoided, and that counsel weave in his or her mental impressions regarding the credibility of the interviewee and the like.<sup>53</sup>

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<sup>49</sup> See Lynch, *supra* note 7, at 386.

<sup>50</sup> See Waxman et al., *supra* note 11, at 40.

<sup>51</sup> See FORTUNE ET AL., *supra* note 1, § 5.8. However, state bar opinions may change in the wake of ABA Formal Ethics Opinion 01-422 (2001), which allows secret recording and reverses ABA Formal Ethics Opinion 337 (1974), which prohibited the practice with a possible exception for law enforcement officials. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001). This new opinion represents a startling reversal of policy.

<sup>52</sup> In the past, some counsel have argued against taking notes, for fear that they might be discoverable. However, the authors feel that an investigation will not have much credibility if it can not be supported by notes. Furthermore, there will usually be more than one investigator in the course of an investigation. The need for communication between investigators and between investigators and counsel, coupled with the problem of fading memories over time, suggest that the taking of detailed notes is advisable. On the need for "a written report that thoroughly and fairly summarizes the factual findings and the bases for them," but "in a way that avoids making unnecessary 'admissions' that can later be mischaracterized in the course of any litigation," see Stoner & Ryan, *supra* note 11, at 662.

<sup>53</sup> See, e.g., Waxman et al., *supra* note 11, at 40. On reflection, the authors do not think that this is necessary in light of the language of the Supreme Court in *Upjohn*. See discussion *supra* notes 40-42 and accompanying text. Professor Brewer says that he does not like the idea of weaving attorney comments into materials (and obviously would not do this in audio or video tape, where it would break up the interview and perhaps reveal things to the interviewee that should not be revealed) since, if the case is being litigated in a state court, under case law that is hostile to the privileges, and if the court orders a turnover, the lawyer will be put to the expense and trouble of redacting such materials to protect opinion work product. See *supra* note 1. We would also point out the following considerations: The observations and insights of investigating counsel (regarding witness



Presumably, the thought is that this will strengthen any claim of work product.<sup>54</sup>

(d) Limiting access to the investigative reports and materials on a strict need to know basis.<sup>55</sup>

## VI. DOES *UPJOHN* APPLY TO A PUBLIC UNIVERSITY?

When deciding if *Upjohn* applies to public universities, the only safe answer is "maybe, and maybe not." After all, the *Upjohn* Court was not dealing with a public entity, and was looking at a question of *federal* evidence law. In order to answer this question in a particular jurisdiction, one must examine not only federal law, but also state evidence law in the particular state.

Many federal courts have held that the *Upjohn* criteria apply to governmental entities as well as to private corporations.<sup>56</sup> Cases involving public universities are hard to find, but they are out there.<sup>57</sup> One of the best illustrative cases actually involves Cornell, which is New York's land grant institution, but which is also a private Ivy-League institution.<sup>58</sup> Let's start

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credibility or possible leads for further investigation) would ordinarily be very valuable to outside or trial counsel who should use and build upon the investigation and underlying work product. Unfortunately, the employer, and even trial counsel, seldom take the time to read all of the underlying material. Furthermore, if it is ruled later that material is discoverable, there may never be any serious effort at redaction.

<sup>54</sup> See generally Lynch, *supra* note 7, at 386 (describing the mechanics of the interview). Usually verbatim transcripts are not made. The assumption apparently being that the verbatim transcript will be less likely to be protected, since some courts believe mistakenly that communications of fact are not covered by the various privileges. See *id.*

<sup>55</sup> See Basri, *supra* note 24, at 493; Wallance & Waks, *supra* note 4, at 518; see also Stoner & Ryan, *supra* note 11, at 652 n.45, 662 ("[I]t is advisable [but perhaps not necessary] to report the results of any investigation to the complaining employee" . . . but "unnecessary or improper disclosure may create a claim for defamation.").

<sup>56</sup> See MUELLER & KIRKPATRICK, *supra* note 36, at 396.

<sup>57</sup> For a recent unpublished opinion, see *Hite v. University of Montana*, No. DV-98-86824 (Mont. 4th Jud. Dist. Ct., Missoula County Apr. 14, 2000) (citing NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY ATTORNEYS, UNDERSTANDING ATTORNEY-CLIENT PRIVILEGE ISSUES IN THE COLLEGE AND UNIVERSITY SETTING).

<sup>58</sup> See *Cornell Facts*, at <http://www.info.cornell.edu/CUFACTS/sidebar.html> (last visited Apr. 24, 2002).



with it, and then see where it leads. The case is *Carter v. Cornell University*.<sup>59</sup>

This case was brought by an African-American female who was employed as an administrative secretary at Cornell. She alleged that she had been passed over for promotion in favor of a less qualified white male, Phillips. To make matters worse, Phillips became her supervisor, and Carter alleged that Phillips began to harass and intimidate her, and that his conduct was rooted in racial animus. She also alleged that she was reprimanded in retaliation for her filing a charge of discrimination with the EEOC.<sup>60</sup>

At some point in the litigation, Carter's counsel decided to depose a Ms. Patricia Flamm, who was the Associate Dean of Human Resources at the Cornell University Medical College. Ms. Flamm had been directed by defendant's counsel to conduct interviews of college employees for the exclusive use of counsel in rendering legal advice to Cornell concerning Carter's complaints of discrimination.<sup>61</sup> During the deposition, defense

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<sup>59</sup> *Carter v. Cornell Univ.*, 173 F.R.D. 92 (S.D.N.Y. 1997), *aff'd*, 159 F.3d 1345 (Table) (2d Cir. 1998) (In its unpublished opinion, the Second Circuit explicitly agreed with the trial judge's ruling on attorney-client privilege.). The case also was cited favorably in a case involving a hospital internal investigation of a claim filed on behalf of an eleven year old African-American girl who claimed that she had been forced by police and hospital personnel to undergo a gynecological exam without her or her mother's consent. *Armstrong v. Brookdale Hosp.*, No. 98 CV 2416(SJ), 1999 WL 690149 (E.D.N.Y. 1999). The investigation had been conducted by a nurse investigator working for a law firm that had been employed by the hospital's insurer. *Id.* at \*1. This case will no doubt be of interest to lawyers advising academic medical centers.

<sup>60</sup> *Carter*, 173 F.R.D. at 93.

<sup>61</sup> *Id.* See also *id.* at 94, 95 n.3, where the court makes the following observation:

Of course, Ms. Flamm, as Associate Dean of Human Resources, does not generally function as counsel's agent and any information which she obtains in connection with her position as Associate Dean is discoverable. However, when, as here, she is told specifically by counsel to conduct an investigation whose sole purpose is to assist counsel in rendering legal representation and she undertakes such an investigation, she becomes counsel's agent for the purpose of that investigation.

Some University EEO officers are practicing lawyers, but some are not. In any event, to safeguard the privileges, counsel should make it clear either in the specific case or by some kind of standing order or directive, that the EEO investigator is conducting the interview or investigation to assist counsel in rendering legal advice. As Professor Robert Lawson noted when reviewing this article, lawyers and judges



counsel objected to certain questions and requests for documents and information on the grounds of attorney-client privilege and work product.<sup>62</sup> The court upheld the claims of privilege citing *Upjohn*. The court reasoned as follows.

The employees in this case were interviewed for the exclusive purpose of obtaining legal advice for the client, and the results of those interviews were passed along in written form to defendant's counsel. If such information could be cavalierly disclosed, the company which would decide to conduct a thorough internal investigation in order to prepare for trial would be a rare one indeed. It is precisely because such investigations are vital to effective trial preparation that the Supreme Court has protected this type of information under the attorney-client privilege.<sup>63</sup>

Furthermore, the work product rule clearly protected other information generated by Ms. Flamm's investigation from disclosure, insofar as Federal Rule of Civil Procedure 26(b)(3) shielded it as material prepared in anticipation of litigation by a party or a party's representative unless the opposing party could demonstrate a substantial need for the material and an inability to obtain it by other means. Here, Ms. Flamm was a "party's representative" who was counsel's agent. The plaintiff's counsel could have done his or her own work and deposed the Cornell employees. So the work product rule also protected the information from disclosure.<sup>64</sup>

In Kentucky, where the authors teach and practice, the attorney-client privilege is governed by Kentucky Rule of Evidence ("K.R.E.") 503. K.R.E. 503(a) defines "[c]lient" as "a person, including . . . [an] entity, either public or private."<sup>65</sup> Furthermore, one of the most influential members of the K.R.E. Study Committee that drafted and recommended the adoption of the rules takes the position that the K.R.E. "clearly intended to employ [the] fundamentals [set out in *Upjohn*] as the framework for the lawyer-client privilege in the corporate context."<sup>66</sup> Indeed, the Study

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ordinarily think of a lawyer's "representative" as someone necessary for the rendition of legal services like a law clerk, secretary, paralegal, or investigator.

<sup>62</sup> *Id.* at 93.

<sup>63</sup> *Id.* at 95.

<sup>64</sup> *Id.* at 95-96.

<sup>65</sup> KY. R. EVID. [hereinafter K.R.E.] 503(a).

<sup>66</sup> ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK 246 (3d ed. 1993). This is accepted (grudgingly?) in Richard A. Bales & Richard O. Hamilton, Jr., *Workplace Investigations in Kentucky*, 27 N. KY. L. REV. 201, 274-77 (2000).



Committee Notes so state.<sup>67</sup> K.R.E. 503(b)(1) provides a privilege for communications "[b]etween . . . a representative of the client and the client's lawyer or a representative of the lawyer."<sup>68</sup> K.R.E. 503(a)(4) defines "[r]epresentative of the lawyer" as "a person employed by the lawyer to assist the lawyer in rendering professional legal services."<sup>69</sup> K.R.E. 503(a)(2)(B) defines "[r]epresentative of the client" to include "[a]ny employee . . . of the client who makes or receives a confidential communication: (i) In the course and scope of his or her employment; (ii) Concerning the subject matter of his or her employment; and (iii) To effectuate legal representation for the client."<sup>70</sup> All of this language does indeed parallel *Upjohn*, and plugs in nicely to the *Cornell* case.<sup>71</sup>

## VII. WHY WOULD YOU WANT TO ASSERT THESE PRIVILEGES?

Before proceeding, we would again like to make the point that an institution, or at least some constituents in an institution, may be troubled by investigations that are less than wide-open to public scrutiny. If such openness is a matter of institutional policy, then so be it. On the other hand,

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<sup>67</sup> See Study Committee Notes, Commentary to Subdivision (a)(2), reprinted in RICHARD H. UNDERWOOD & GLEN WEISSENBERGER, KENTUCKY EVIDENCE: 2001 COURTROOM MANUAL 548-49 (2000). Unfortunately, the Study Committee Notes may be unnecessarily grudging insofar as they suggest that the statements of former employees are not covered. See LAWSON, *supra* note 66, at 247. Federal cases interpreting *Upjohn* sensibly extend the protection of the privilege of *Upjohn* to communications with former employees as needed for the rendering of legal services, at least insofar as the communications relate to the subject matter of the former employment. See cases collected in LAWSON, *supra* note 66, at 247 n.116; WOLFRAM, *supra* note 35, at 285. But see MUELLER & KIRKPATRICK, *supra* note 36, at 387-88. Of course, witness statements and the like taken from former employees would still be covered by the work product privilege in both state and federal court. See UNDERWOOD & WEISSENBERGER, *supra*, at 170.

<sup>68</sup> K.R.E. 503(b)(1) (emphasis added).

<sup>69</sup> *Id.* at 503(a)(4) (emphasis added).

<sup>70</sup> *Id.* at 503(a)(2)(B) (emphasis added).

<sup>71</sup> Compare Monica L. Goebel & John B. Nickerson, *Prompt Remedial Action and Waiver of Privilege*, 35 ARIZ. ATT'Y 24, 28 (1999), which states:

Varying actions and levels of attorney involvement may be utilized in order to bring the investigation within the protections of the privilege. . . . [T]he attorney's role could range from personally conducting all aspects of the investigation to merely guiding the human resources personnel on actions to be taken as the investigation proceeds.



any such policy should have been arrived at only after thorough consideration of the consequences, not just to the institution and its constituents, but to the individuals involved in or impacted by the investigation. Furthermore, any such policy should be explainable and explained. University presidents and chancellors may have a fiduciary obligation, defeasible only by the Board of Regents or Trustees, to protect information subject to the attorney-client privilege and work product doctrine, even as against the position or resolutions of a Faculty Senate or other body. In any event, we are lawyers, and so we must be predisposed to protecting all privileges. Also, in addition to the mandate of professional ethics, there are many practical reasons for protecting all privileges, at least at the outset.<sup>72</sup>

First and foremost, confidentiality, to the extent that it can be maintained, encourages participation. Consider the views of one commentator who was recalling the good old days before government imposed "corporate compliance:"

The attorney typically advises the employee that, though the corporation may waive privilege at some point in the future, it has no present intention to do so. The attorney may tell the employee that the investigation is being conducted to allow the corporation to determine what happened and how best to proceed. In the vast majority of cases, while the employee may feel he must cooperate with the employer's inquiry, the employee will take some comfort in counsel's representation

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<sup>72</sup> The authors admit that they may seem a bit schizophrenic on this issue. One author is a former defense lawyer who thinks in terms of protecting the institution, although that is hardly inconsistent with rooting out wrongdoing. The other author is an EEO officer. In the EEO officer's view, the EEO officer's duty is to investigate to assure compliance and to insure that students and employees are protected. At the same time, the EEO officer does not represent the complainant, or report to the complainant any more than is necessary to responsibly resolve the complaint. The EEO officer should not assume the role of advocate for the complainant or the accused, and should not assume the role of an adversary of the institution. It is the EEO officer's responsibility to be objective and fulfill his or her obligation to assure that the institution complies with the applicable law and its own policies. At the same time, the results of the EEO officer's investigation are going to be relied upon by the institution's legal counsel in giving legal advice to the institution. Throughout this Article, it is our assumption that conducting the investigation in such a way as to preserve evidentiary privileges is consistent with these duties. The desirability of waiver in a particular case is a matter to be considered by the institutional client following advice by in-house or outside legal counsel.



that the company has not yet decided to disclose to the government information learned from the employee. Historically, because it was not a foregone conclusion that the employee's statements would be delivered to the government—indeed, such a disclosure would have been unusual—the investigative process would typically remain a private inquiry among a corporate employer, its counsel, and its employees.<sup>73</sup>

In other words, investigations conducted in the sunshine are not likely to get anywhere. Investigations are disruptive. Bad relationships can be made worse—worse still with unnecessary disclosures of who said what to whom. Also, there is the matter of bad publicity.<sup>74</sup>

Secondly, one assumes that the institution will want to solve the “problem” without subjecting itself to unnecessary embarrassment or liability. There may be no liability; and even if there is exposure, the responsible officials within the institution have the right and duty to minimize the institution's exposure. In an adversary system the institution has every right to make the plaintiff do his or her own work, and meet his or her burden of proof on the relevant issues.<sup>75</sup> “[G]ood faith investigations often result in paper trails for external, hostile parties to follow.”<sup>76</sup> Even in cases where the investigator finds no liability, the report of the investigation, and the investigatory materials, will provide plaintiff's counsel with a road map.<sup>77</sup> By waiving any possible privilege and turning over the report of investigation and supporting materials:

The employer gives the plaintiff] a firsthand look at how the attorney viewed the case based on the witnesses that were interviewed, the order

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<sup>73</sup> Zornow & Krakur, *supra* note 26, at 153.

<sup>74</sup> Lynch, *supra* note 7, at 401-02 (discussing risks of negative publicity and the disruptive effect an inquiry can have on on-going relations with insiders and outside individuals and organizations).

Employees are often hesitant to bring complaints to the EEO officer because they fear that their complaints will be the subject of talk in the community, or the stuff of a news story. Of course, confidentiality cannot be guaranteed, and the privilege is the institution's to waive; but to the extent that confidentiality can be maintained during the investigation, complainants are likely to be more forthcoming. Many complaints will be resolved satisfactorily without litigation.

<sup>75</sup> But for the attitude of the plaintiff's bar, see *supra* note 6 and accompanying text.

<sup>76</sup> Kevin Mark Smith, *Preventing Discovery of Internal Investigation Materials: Protecting Oneself From One's Own Petard*, 69 J. KAN. B.A. 28, 28 (2000).

<sup>77</sup> See Joseph T. McLaughlin & J. Kevin McCarthy, *Corporate Internal Investigations—Legal Privileges and Ethical Issues in the Employment Law Context*, SD06 ALI-ABA 991, 993 (1998); Savarese & Miller, *supra* note 36, at 530, 534.



in which those witnesses were interviewed, the type and nature of the questions asked of those witnesses and any notes taken by the attorney for those witnesses. This would certainly provide the plaintiff with an advantage in litigation.<sup>78</sup>

In other words, even in cases in which there is no apparent liability, the institution may not want to turn over a report or other investigatory materials to plaintiff's counsel. Even a strong report will probably not make the plaintiff go away. Seemingly good facts can be twisted or taken out of context. Admissions or seemingly bad facts about the alleged harasser or others that seem unimportant can come back to bite.<sup>79</sup> Furthermore, "[w]ith the benefit of hindsight, parties in subsequent civil or criminal actions may look for any inaccuracies in the report, however minor or insignificant to support an argument that the report was an attempt to hide or downplay misconduct."<sup>80</sup>

There is also a whole range of investigative outcomes besides "no liability" and "lost cause." An investigation may not be completed because of uncooperative witnesses, an uncooperative complainant, or too little time or resources. An investigation may not have been undertaken or may have been abandoned because it was simply too late to remediate. An investigation may be completed, but the situation may remain ambiguous. Finally, there are limits on any investigation. The investigator will not have the benefit of the discovery rules or the subpoena power, or the ability to secure information under oath and during cross-examination. The investigator may not explore certain avenues for fear of disruption of the institution's business, or the fear of spreading information outside the organization. Again, outside counsel who is hired to defend subsequent litigation must understand the limits of even the best investigation, and cannot simply rely upon the report.

Finally, there is the possibility of tort liability to the complainant, the alleged harasser, witnesses and others, which relates back to the problem

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<sup>78</sup> Judith E. Harris, *Sexual Harassment Investigations*, SE17 ALI-ABA 53, 65 (1999).

<sup>79</sup> See Jeffrey A. Van Detta, *Lawyers as Investigators: How Ellerth and Faragher Reveal a Crisis of Ethics and Professionalism Through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases*, 24 J. LEGAL PROF. 261, 310 (2000) (the report or other work product may reveal the "dirty details" of an investigation, such as compromises made to ease the harasser out, blunt assessments of the accuser, the accused, and other witnesses, other information unearthed about the players, and so on).

<sup>80</sup> Lynch, *supra* note 7, at 404.



of securing cooperation. Witnesses do not want to get tied up in litigation or be harassed.

Most counsel are aware of the qualified privileges that can be used as defenses to these suits.<sup>81</sup> However, many employment lawyers take very little comfort from the existence of these qualified privileges since the plaintiff will invariably allege the existence of "malice."<sup>82</sup> In some cases, but certainly not all cases,<sup>83</sup> there is some risk that the issue will have to go

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<sup>81</sup> See Peter M. Panken et al., *Creating a Harassment-Free Workplace*, SE42 ALI-ABA 1125, 1137-38 (1999).

<sup>82</sup> See, e.g., Arnold H. Pedowitz, *What Goes Around Comes Around, the Legal Implications Arising From Sexual Harassment Investigations, a Plaintiff's View*, N98SHCB ABA-LGLED D-59, n.3 (ABA Ctr. for CLE 1998). In addition to the threat of lawsuits for traditional torts such as libel and slander and infliction of emotional distress, a worrying number of new theories are being advanced by lawyers representing male employees disciplined or investigated for sexual harassment. See Ernest F. Lidge III, *The Male Employee Disciplined For Sexual Harassment as Sex Discrimination Plaintiff*, 30 U. MEM. L. REV. 717 (2000). One of the more distressing developments is the suggestion by the Federal Trade Commission ("FTC") that "'outside organizations [law firms] utilized by employers to assist in their investigations of harassment claims' may be consumer reporting agencies" whose investigative reports, called "investigative consumer reports," would be subject to the Fair Credit Reporting Act. See Michael Delikat, *Sexual Harassment Update*, 656 PLI/LIT 373, 491-92 (2001). The implications of this would be that written authorization of the alleged harasser might have to be obtained before an investigation could be conducted, which would mean that in many cases the employer could not comply with the requirements of other federal law that the employer take prompt and effective remedial action. Furthermore, the alleged harasser would have to be able to obtain a copy of the report, and would have a right to dispute the accuracy and completeness of the report in the event of adverse action. See *id.* at 491-96; Van Detta, *supra* note 79, at 321-22. Employees will be less likely to participate in investigations under such a regime, and employers may be tempted to keep sexual harassment investigation in-house, but then face claims that its investigations are biased or ineffective due to the limited resources of in-house investigators and delay associated with overload. See Kim S. Ruark, Note, *Damned If You Do, Damned If You Don't? Employers' Challenges in Conducting Sexual Harassment Investigations*, 17 GA. ST. U. L. REV. 575, 602-03 (2000). For a recent case rejecting the FTC's position, see *Hartman v. Lisle Park District*, 158 F. Supp. 2d 869, 876 (N.D. Ill. 2001).

<sup>83</sup> For cases in Kentucky's jurisdiction in which the privilege has been applied as a matter of law on a motion for summary judgment or a motion for a directed verdict see *Smith v. Westlake PVC Corp.*, No. 96-6550, 1997 WL 764489 (6th Cir. Dec. 3, 1997); *Hughes v. DHL Worldwide Express*, No. 94-3185, 1995 WL 399072 (6th Cir. July 6, 1995); *Parrish v. Ford Motor Co.*, No. 91-5300, 1992 WL



to the jury, which is always a dangerous proposition.<sup>84</sup> Some firms are now demanding that their corporate clients agree to indemnify them, or add investigating counsel to the corporation's D&O policy, since retaliatory lawsuits are "becoming more popular."<sup>85</sup>

Although the case law is limited, the authors would argue that absolute privileges should also be asserted. One is the so-called "litigation privilege," which provides an absolute privilege for witnesses and counsel for communications preliminary to a reasonably anticipated proceeding.<sup>86</sup> While the privilege is usually claimed by a party, a witness, or a lawyer who later served as trial counsel, there is no reason not to extend it to

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20305 (6th Cir. Feb. 7, 1992); *Landrum v. Braun*, 978 S.W.2d 756 (Ky. Ct. App. 1998) (claims dismissed on motion before trial); *Wyant v. SCM Corp.*, 692 S.W.2d 814, 816 (Ky. Ct. App. 1985) (internal report not "published," and qualified privilege applied on directed verdict motion).

<sup>84</sup> See Ellen M. Martin et al., *Workplace Claims: Wrongful Termination, Collateral Torts, Privacy, Restrictions on Right to Compete, Reference Checks, and Investigations*, 614 PLI/LIT 511, 555-57 (1999). For an interesting case see *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282 (Tex. Ct. App. 2000) (confused [?] jury awarded discharged alleged harasser \$2.3 million actual and \$800,000 punitive damages; verdict reversed on appeal and plaintiff given a take nothing judgment because of absence of malice; appellate court also rejected a negligent investigation claim as a matter of law).

<sup>85</sup> Waxman et al., *supra* note 11, at 36. Professor Brewer, see *supra* note 1, called our attention to a recent Pennsylvania trial court decision in which a male employee was awarded \$150,000 against an employer and a female employee who accused the male employee of rape, where it was determined that the two were engaged in a consensual relationship. See Shannon P. Duffy, *Employee Awarded \$150,000 After Co-Worker Falsely Accuses Him of Rape*, THE LEGAL INTELLIGENCER, Oct. 24, 2001, at <http://www.law.com> (discussing the case of *Jackson v. McCrory* in Philadelphia). The award was later thrown out by the trial judge, who noted, among other things, that the employer's investigation (which the jury took to be an invasion of the plaintiff's privacy) was mandated by federal law. See Lori Litchman, *Judge Throws Out Jury Award in Worker Privacy Case*, THE LEGAL INTELLIGENCER, Apr. 16, 2002, at <http://www.law.com>.

<sup>86</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 57 (2000); RESTATEMENT (SECOND) OF TORTS §§ 585-89 (1977). For an interesting application of the absolute privilege under Kentucky law see *General Electric Co. v. Sargent & Lundy*, 916 F.2d 1119 (6th Cir. 1990); see also Vitauts M. Gulbis, Annotation, *Libel and Slander: Attorney's Statements to Parties Other Than Alleged Defamed Party or its Agents, in Course of Extrajudicial Investigation or Preparation Relating to Pending or Anticipated Civil Litigation as Privileged*, 23 A.L.R.4TH 932; Bernard E. Jacques, *Defamation in an Employment Context: Selected Issues*, 625 PLI/LIT 829, 847-48 (2000).



investigating counsel,<sup>87</sup> who is frequently hired to report to regular in-house or regular outside litigation counsel. The investigating counsel is, in effect, preparing for the defense of the anticipated claim, even if it is likely that he or she would be precluded from serving as trial counsel because of the lawyer-witness rule.<sup>88</sup> The litigation privilege is founded on public policy considerations—that claims be fully and fairly investigated and litigated. Applying it to protect parties, witnesses, and investigators participating in workplace claims makes sense, especially given the fact that many investigations are required by law.

In addition, we draw the readers' attention to the recent Second Circuit case of *Malik v. Carrier Corp.*<sup>89</sup> In that case, an alleged sexual harasser sued his employer unsuccessfully, alleging a battery of state tort claims. The court rejected claims for "negligent investigation," negligent infliction of emotional distress and tortious interference, finding, as a matter of law, that they should not have been submitted to a jury.<sup>90</sup> The court reasoned that since "an employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer."<sup>91</sup> "[C]orrective actions that a risk-averse employer might take to comply with federal law [such as an investigation] may not give rise to a negligence action, whether the rationale is couched in terms of breach, legal duty, or privilege."<sup>92</sup> If such state claims were allowed to go to a jury,

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<sup>87</sup> See Jacques, *supra* note 86, at 849 (citing *Trachsel v. Two Rivers Psychiatric Hosp.*, 883 F. Supp. 442, 444 (W.D. Mo. 1995) (plaintiff filed a sexual harassment suit and accused harasser counterclaimed for defamation; statements in correspondence sent by plaintiff's lawyer to co-defendant hospital before lawsuit was filed were within the litigation privilege, an absolute privilege under Restatement § 586 and Missouri law); *Peterson v. Ballard*, 679 A.2d 657 (N.J. Super. Ct. App. Div. 1996) (a New Jersey case holding that the litigation privilege shields lawyers (and presumably other investigators) investigating a sexual harassment claim from actions for defamation, intentional infliction of emotional distress, or invasion of privacy)).

<sup>88</sup> Cf. Harris, *supra* note 78, at 60.

<sup>89</sup> *Malik v. Carrier Corp.*, 202 F.3d 97 (2d Cir. 2000). This case has been noted as significant in a number of publications. See, e.g., Delikat, *supra* note 82, at 490; Jacques, *supra* note 86, at 331.

<sup>90</sup> *Malik*, 202 F.3d at 100.

<sup>91</sup> *Id.* at 105 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Torres v. Pisano*, 116 F.3d 625, 636 (2d Cir. 1997); *Snell v. Suffolk County*, 782 F.2d 1094, 1104 (2d Cir. 1986); 29 C.F.R. § 1604.11(d) (2001)). 29 C.F.R. § 1604.11(d) is a guideline issued by the EEOC which seemingly requires an investigation by the employer. See Panken et al., *supra* note 81, at 1138.

<sup>92</sup> *Malik*, 202 F.3d at 106.



virtually any employer investigation into allegations of sexual harassment would expose the employer to liability. Such investigations foreseeably produce emotional distress—often in copious amounts—in alleged harassers, whether guilty or innocent. As with any investigation into potentially embarrassing personal interactions, confidentiality is difficult or impossible to maintain if all pertinent information is to be acquired from all possible sources.<sup>93</sup>

While the court decided the case based on its interpretation of Connecticut law, finding no conflict between Connecticut and federal law, the court also suggested that the result would be required by federal preemption. In other words, one may argue that the result is compelled by federal law and policy in every state, and in both state and federal court proceedings.<sup>94</sup> Note also

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<sup>93</sup> *Id.*; see also *Ribando v. United Airlines, Inc.*, 200 F.3d 507 (7th Cir. 1999) (female sued under Title VII claiming that investigation of her alleged misconduct complained of by male employees created embarrassment and hostile work environment; summary judgment for employer; implication that federal discrimination claim should not interfere with duty to investigate); *McDonnell v. Cisneros*, 84 F.3d 256, 261 (7th Cir. 1996) (complaint under Title VII based on theory that investigation of groundless charges of sexual misconduct was faulty or unnecessarily hostile, and got the rumor mill spinning, which injured the reputation of the accuseds and was itself a form of sexual harassment; claims rejected because entertaining such claims would place the employer "on a razor's edge"); *Wal-Mart Stores, Inc. v. Lane*, 31 S.W.3d 282, 292-93 (Tex. App. 2000) (the alleged harasser launched something like a defensive, if not preemptive, strike, by complaining that his accuser had been spreading rumors about him); *Mary Rose Strubbe, Application of Faragher v. Boca Raton and Burlington Industries, Inc. v. Ellerth to Claims by Accused Harassers*, 1 ANN. 2000 ATLA-CLE 379 (2000).

<sup>94</sup> See generally *Theodora R. Lee, The Year in Review: Significant Developments*, 637 PLI/LIT 151 (2000). Logically, the same reasoning would preclude similar suits brought by a disappointed victim of alleged sexual harassment or other claimed discrimination who does not like the result of an internal investigation or who claims that the investigation caused the claimant distress. In *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997), the plaintiff complained of harassment but specifically asked that the information be kept confidential. *Id.* at 639. On the facts of the case the court held that this relieved the employer of the obligation to investigate or otherwise address the problem. On the other hand, the court also noted that in most cases the employer would have an obligation to remedy the situation even if the claimant wanted confidentiality. *Id.* *Malik* cites *Torres* and other cases for the proposition that an employer must go forward with an investigation or risk liability even if the alleged victim decides to withdraw the complaint, or otherwise urges that the investigation be terminated or requests that his or her complaint be kept confidential. *Malik*, 202 F.3d at 106-07.



that the reasoning of the *Malik* court is fully consistent with arguments in support of the litigation privilege.<sup>95</sup>

### VIII. HOW, AND WHY, ARE THE PRIVILEGES WAIVED?

Should the employer make testimonial use of a report of an internal investigation, or other evidentiary materials, or put such materials in issue by defensive pleadings, it is likely that the trial court will be all too willing to hold that any privileges have been waived.<sup>96</sup> This is so despite what some have called the “dubious validity” of the doctrine of “at issue” waiver,<sup>97</sup> and academic criticism of its expansive application.<sup>98</sup>

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<sup>95</sup> See *supra* notes 86-88 and accompanying text.

<sup>96</sup> See Alan M. Klinger & James L. Pernard, *An Update to a Comprehensive Survey of the Attorney-Client Privilege and Work Product Doctrine By The Honorable Alvin K. Hellerstein*, U.S.D.J., S.D.N.Y., SE63 ALI-ABA 201, 211 (1999) (citing cases critical of the breadth of the “at issue” waiver doctrine). See also Harris, *supra* note 78 (discussing *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084 (D.N.J. 1996) (where investigation found no evidence of harassment, a defense based on a prompt investigation waived the privilege)). Presumably, the plaintiff in *Harding* proved discrimination, and the employer felt that it had to fall back on the investigation. See hypothetical 2 in text below. Question: Does it make any sense to say that an employer can be liable for an inadequate investigation even where plaintiff fails to prove discrimination, harassment, or other misconduct? Presumably not, but that is not how the cases are being tried these days! Presumably the law only makes sense if the plaintiff is required to make out a *prima facie* case. If the employer is convinced that plaintiff cannot do this, then why assert the limited affirmative defense and waive the privileges? See the discussion of *Robinson v. Time Warner*, *infra* note 130 and accompanying text.

Should a copy of the investigator's report be given to the complainant? This may well result in waiver. Will the waiver extend to all aspects of the investigation, and all materials generated as a part of the investigation? To what extent does the investigator have a duty to the complainant to report back? Presumably any duty would be limited to that necessary to insure that the complaint has been resolved and to insure that the complaining party will be protected. (Of course, any letter of reprimand sent to the offender probably will not be privileged, and may be discoverable under the open records law, depending on the jurisdiction.) Does reporting back to the complainant waive attorney-client privilege? The limited reporting we have suggested as being “necessary” should not. Too much reporting may very well result in waiver.

<sup>97</sup> *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 863-64 (3d Cir. 1994) (doctrine of “dubious validity” since it would seem to require waiver any time a party's state of mind is at issue).

<sup>98</sup> *Allen v. W. Point-Pepperell Inc.*, 848 F. Supp. 423, 429 (S.D.N.Y. 1994) (“Expansive interpretation of ‘at issue’ waiver . . . has recently been the subject of significant legal and academic criticism.”).



This Article will discuss the reasons why an employer might want to avoid waiver by not using the report as an "affirmative defense" or by otherwise putting it in issue. Consider the following statement, which is taken from a speaker's handout at a recent conference:

Should the internal investigation be conducted so as to protect it from disclosure? It may be that the answer to this question is no. It is often the case that the purpose of an investigation is to protect the institution by providing a basis for decision-making. In other words, the purpose of the investigation is to determine how the institution should respond to a complaint and that the institution will ultimately want to rely on that investigation if it is called upon to defend the response at a later time.<sup>99</sup>

It may be that an institution's constituents (in the case of a university, the constituents would include the faculty and students as well as the administrators) might argue that for policy and public relations purposes, no privileges should be claimed. While the authors view this approach as unrealistic and undesirable, it is nevertheless defensible, assuming that appropriate thought has been given to the consequences. The excerpt above does not seem to be based on such a fundamental policy analysis. Instead, it seems to be based on the notion that waiver is inevitable, if not desirable, in all cases. Our criticism of the notion that waiver is inevitable, if not desirable, in all cases is based on three considerations: (1) that the privilege can be set up in the first instance, leaving an informed decision on waiver for a later time; (2) that the employers' so-called "affirmative defenses" are much more limited, and much less available, than many counsel assume they are; and (3) that the reality of litigation is that following waiver and production, plaintiffs' counsel may put the internal report on trial, subjecting it to an unrealistic degree of scrutiny, thereby confusing the jury as to the real issues of the case. For example, a plaintiff may convince the jury that there was some defect in the investigation, and that proof of that fact is the equivalent of proof of employer liability.

The first consideration stated above, that the privilege can be set up, leaving time later for an informed decision on waiver, seems obvious. You cannot claim privilege if you have not done the work to set it up. Why not do the work, and consider the issue of waiver later, after a consideration of all the circumstances? As one commentator has stated:

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<sup>99</sup> Speaker's Handout, June 2000 NACUA Conference (from author's file, regrettably misplaced and unavailable for further attribution).



[A]s the facts develop, the employer may not need to establish [an affirmative defense like] prompt remedial action, and will instead wish to keep all aspects of the investigation shielded by the attorney-client or work-product privileges. Accordingly, the attorney should advise the client on steps to take to preserve the privilege. Even though the client may later decide to waive the privilege, it will not have the luxury of making that choice if the privilege does not attach in the first instance.<sup>100</sup>

We now proceed to the second and third considerations stated above.

Consider the following scenarios:

(1) Employer suspects wrongdoing or alleged wrongdoing has been reported. Employer promptly conducts an investigation and all steps are taken to preserve all privileges. The investigators find no evidence in support of the claims, or concludes that the plaintiff will be unable to meet the burden of proof. Employer wants to use the report to prove that no misconduct took place.

An attempt to use the report to prove that there was, in fact, no wrongdoing raises several points which are often overlooked. First, this is a hearsay use of the report, and the report should not be admissible for that purpose.<sup>101</sup> On the other hand, an attempted use will lead to claims of waiver of any privilege that would otherwise be available; and any bad facts contained in the report will be admissible as admissions. Therefore, why not just defend the case, using the report as a road map for the defense?<sup>102</sup>

(2) Same facts, but assume for the time being<sup>103</sup> that under the substantive law the employer is liable only if the employer knew or should

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<sup>100</sup> Goebel & Nickerson, *supra* note 71, at 28.

<sup>101</sup> See, e.g., *Berrier v. Bizer*, 57 S.W.3d 271, 276 (Ky. 2001). See also *Williams v. Gen. Motors Corp.*, No. 00-3256, 2001 WL 1006288, at \*5 (6th Cir. Aug. 24, 2001) (investigator's notes of interviews would be hearsay if offered for the truth of the matter asserted but may be admissible on the issue of the employer's response under *Farager/Ellerth*). Unfortunately, some outside counsel seem to think that a report of an internal investigation finding no misconduct can be offered as substantive proof of the facts asserted therein, despite the rather obvious hearsay problem. Some counsel even make the mistake of believing that a solid investigation will persuade a plaintiff's counsel that he or she has no case!

<sup>102</sup> "[T]he employer defending a workplace harassment lawsuit must prepare a thorough and vigorous defense to serve with equal effectiveness the dual options of jury trial or strategic settlement." Van Detta, *supra* note 79, at 265.

<sup>103</sup> Suspend, for a moment, your knowledge of, and any enthusiasm for, the more limited *Ellerth* and *Faragher* affirmative defense.



have known of the wrongdoing and failed to act reasonably. Again, consideration should be given to whether the plaintiff can meet the burden of proof. If so, the report may provide a defense under the law governing liability, because it can establish a lack of notice, or because the investigation was part of an appropriate remedial response. Of course, use of the report for these purposes may result in an issue waiver, but waiver may be the best course of conduct.

(3) Same facts, and the issue is whether the employer should be liable for punitive damages.<sup>104</sup> Again, counsel should first determine if the plaintiff can make a case for punitives. If so, the report may be used as evidence of appropriate and prompt remediation, or even good faith reliance on advice of counsel, which might defeat claims of oppression or malice. Again, putting the report at issue may make some sense, although waiver may result.

(4) Same facts as in number three above, but the case is in an *Ellerth/Faragher* jurisdiction, and counsel determines that those cases will apply to the claim. Here is where we have to think. As the following discussion points out, the new test under *Ellerth/Faragher* has more than one "prong." Can all of the prongs of the test be met? What if time and resource limitations, or other problems, prevented the investigation from being completed or resulted in a level of uncertainty as to the findings? If there are serious doubts along these lines, what is the point of putting the report in issue and waiving otherwise applicable privileges? Would it not be more sensible to hang on to the privilege and make plaintiff prove a case without the assistance provided by any report of investigation? Of course, if the privilege has not been preserved, counsel will not have the luxury of making sensible tactical decisions.

In *Faragher v. City of Boca Raton*,<sup>105</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>106</sup> the United States Supreme Court held that under the federal Civil Rights Act:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a superior with immediate

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<sup>104</sup> Insofar as punitive damages are concerned, *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 544 (1999), indicates that an employer will not be vicariously liable for punitive damages if the employees's actions are contrary to the employer's "good faith efforts to comply with Title VII." On the conflicts that may arise if the employer's trial counsel has been involved in the formulation, implementation, and application of the employer's policies see Van Detta, *supra* note 79, at 352-53.

<sup>105</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>106</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).



(or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in tangible employment action, such as discharge, demotion, or undesirable reassignment.<sup>107</sup>

One may well ask why counsel for employers are so enthusiastic about the prospects of asserting this affirmative defense. Previously there was no agreement on the rule governing employer liability for harassment committed by a supervisor. The lower federal courts had been applying "widely varying standards."<sup>108</sup> In cases in which the *Faragher/Ellerth*

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<sup>107</sup> *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

<sup>108</sup> George L. Lenard & Christopher A. Ott, *Recent Developments in Sexual Harassment Law*, 56 J. MO. B. 84, 85 (2000):

The cases indicated a variety of theories for liability, including: (1) the employer is liable if the harassment can be said to have involved a *quid pro quo* threat or promise, even if unfulfilled; (2) the employer is liable if the harassment can in some sense be said to have been within the harasser's scope of employment or apparent authority; (3) the employer is liable if the supervisor can be said to have been aided by his supervisory authority in accomplishing the harassment; and (4) the employer is liable if it knew or should have known of the harassment, but failed to take prompt and appropriate remedial action.

*Id.* at 85 n.19.

While *Farragher* and *Ellerth* have created uniform rules for employers for supervisor harassment under federal law, state law is not uniform. See *Dep't of Health Servs. v. Superior Court (McGinnis)*, 113 Cal. Rptr. 2d 878 (Cal. Ct. App. 2001). In this case, the court opined that there is no *Farragher/Ellerth* affirmative defense to supervisor harassment under the California Fair Employment and Housing Act ("FEHA"); that Title VII does not specifically address employer liability for supervisor harassment, but the FEHA does; that under the language of the FEHA "Harassment by a nonsupervisory coworker is unlawful only if the employer knew, or should have known, of the harassment and failed to correct it [compare discussion in text at *supra* note 94] . . . [but] . . . [n]o such limitation exists for harassment by a supervisor or agent"; that under California law an employer is strictly liable for supervisor harassment; and that the employer's knowledge and action are irrelevant! Therefore, the case for preserving attorney-



defense potentially applies,<sup>109</sup> the defense will be more limited than whether the employer knew or should have known of the harassment. There will be no affirmative defense if tangible employment action has already been taken, so those cases can be set aside. In the remaining cases, both prongs of the *Faragher/ Ellerth* defense will have to be satisfied. Addressing the first prong, this means that there must be effective complaint and investigatory procedures, and that investigations must be timely.<sup>110</sup> This might not appear to be unreasonable at first blush, but the fact of the matter is that few public institutions are going to have sufficient and adequately trained staff to investigate every complaint as immediately and as thoroughly as it will be argued, after the fact, that it should have been investigated. Indeed, case law suggests that courts may allow jurors to second guess investigators, making much ado of perceived "investigatory flaws"<sup>111</sup> and allowing juries to find liability in the event that the employer and the employer's investigatory agent make assessments of the credibility of witnesses which disagree with the jury's ultimate assessments.

The point is that in a great number of cases, the employer's good faith effort to investigate is not going to be sufficient.<sup>112</sup> Furthermore, of the

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client privilege and work product during internal investigations in California would seem to be all the more important.

<sup>109</sup> See discussion *supra* note 11.

<sup>110</sup> Stoner & Ryan, *supra* note 11, at 662 ("When complaints are made, employers must respond to them by promptly interviewing the accuser, the accused, and witnesses, gathering any documentary or other evidence, and documenting the investigatory process.").

<sup>111</sup> Compare the more sensible approach of the court in *Silva v. Lucky Stores, Inc.*, 65 Cal. App. 4th 256 (1998), in which an alleged harasser, Silva, sued the employer after the employer terminated him for violating the company's sexual harassment policy. Silva attacked the adequacy of the employer's investigation of him, contending that the employer's good faith belief that he engaged in harassing behavior was no defense to his wrongful discharge claim. *Id.* at 273-75. The court rejected each allegation of investigatory flaws, noting that "[w]hile the investigation was not perfect, it was appropriate given that it was conducted 'under the exigencies of the workaday world and without benefit of the slow-moving machinery of a contested trial.'" *Id.* at 275.

<sup>112</sup> See Barbara Barish Brown et al., *Recent Significant Developments in the Law of Harassment*, VLR994 ALI-ABA 377 (1999); Harris, *supra* note 78, at 56, 57 (no affirmative defense if supervisor has already taken adverse action; the investigation, in and of itself, is not sufficient to preclude liability, because there must be a timely remedy); Alan M. Koral, *Practice Pointers on Proving the Affirmative Defense Established By Ellerth and Faragher Step Two: Proof That the Employer Took Reasonable Steps to Correct Sexual Harassment*, 606 PLI/LIT 215, 257-58 (1999). See also *Williams v. Gen. Motors Corp.*, No. 00-3256, 2001 WL



remaining cases—cases in which the employer has investigated promptly and taken appropriate action—the affirmative defense may still not be available.<sup>113</sup> If we read *Faragher* and *Ellerth* literally, unless the employee acts unreasonably, the employer will still be liable, regardless of the fact that it has acted reasonably.<sup>114</sup>

Consider the recent Sixth Circuit case of *Barna v. City of Cleveland*.<sup>115</sup> The facts of the case arose as follows: A commercial painter employed by

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1006288, at \*5 (6th Cir. Aug. 24, 2001) (investigator's notes of interviews would be hearsay if offered for the truth of the matter asserted but may be admissible on the issue of the employer's response under *Faragher/Ellerth*, but presumably not if plaintiff has suffered a tangible employment action as a result of the supervisor's harassment).

<sup>113</sup> See *Fall v. Ind. Univ. Bd. of Trs.*, 12 F. Supp. 2d 870, 881-84 (N.D. Ind. 1998) and 33 F. Supp. 2d 729 (N.D. Ind. 1998). In this case, the court held that the university employer satisfied the first prong of the *Faragher-Burlington* affirmative defense by doing a prompt and expansive investigation of the victim's complaint which led to the resignation of the harasser (the University Chancellor!). The University's affirmative defense nevertheless failed because the university had constructive knowledge that there had been previous misconduct and complaints involving other victims. This knowledge was considered to be proof that the University had not acted reasonably to prevent the harassment by responding to previous complaints! *Fall*, 12 F. Supp. 2d at 881-82. Needless to say, this reinforces the notion that the university may have to be more vigilant or escalate its response to "repeat-offenders" or alleged harassers "with a history." But see *Bank One, Ky. v. Murphy*, 52 S.W.3d 540, 545-46 (Ky. 2001) (*Ellerth/Faragher* affirmative defense available in actions brought under K.R.S. § 344.040; but evidence that employer put on notice of employee's sexual harassing conduct because of perpetrator's "widespread" past conduct, "even though [the employer] may not have known that this particular plaintiff was one of the perpetrator's victims" was a triable issue of fact which precluded grant of summary judgment for employer). The *Fall* and *Bank One* cases serve as a warning of the potential conflicts that may be faced by an in-house investigator who has received complaints in the past about the alleged harasser during the investigator's (or, in the case of an outside law firm's or outside investigator's) long-term relationship with the employer client.

<sup>114</sup> This point was not lost on the Supreme Court of Michigan. In *Chambers v. Tretco, Inc.*, 614 N.W.2d 910 (Mich. 2000), the court refused to follow *Faragher* and *Ellerth* in interpreting the Michigan Civil Rights statutes, at least in the context of hostile environment harassment. The court not only noted the fact that under *Faragher* and *Ellerth* the employer would have to prove that it was not negligent and that the employee was negligent to avoid vicarious liability, but also that the whole effect was to shift the burden of proof to the defendant. *Id.* at 917.

<sup>115</sup> *Barna v. City of Cleveland*, No. 96-3971, 96-4178, 97-4130, 1998 WL 939884 (6th Cir. Dec. 22, 1998).



the City of Cleveland sued under Title VII, alleging that her supervisor sexually harassed her and created a hostile work environment. The plaintiff left her job without explanation of adverse notice to anyone at the recreation center which was her jobsite.<sup>116</sup> She testified that she had attempted to reach her supervisor's superior, the Commissioner of Recreation, but without success.<sup>117</sup> She did complain to her union, which notified the City's EEO office. Following established procedures, the EEO manager reviewed her complaint, spoke with her on "numerous occasions," and attempted to get all of the details of the harassment. *The plaintiff did not inform the EEO manager of all of the details to which she would later testify at trial* (particularly the most spectacular, which included her supervisors alleged demand for oral sex).<sup>118</sup> The EEO manager interviewed witnesses, and concluded that none of them corroborated the plaintiff's complaint. However, one of these witnesses, Joyce Grayson, would later testify that the supervisor made "sexual overtures" to the plaintiff and was "rude" to her. The EEO manager conducted a pre-disciplinary hearing. The supervisor denied the plaintiff's allegations. No evidence was received corroborating plaintiff's claims. At the end of the hearing, the EEO manager concluded that he could not confirm or deny the allegations and issued a report to that effect, noting that the supervisor had no prior disciplinary record.<sup>119</sup> The only action taken was to inform the supervisor of the employer's policies and to give him informational literature. At trial, the plaintiff testified to the conduct of which she had not informed the EEO officer. Furthermore, Joyce Grayson testified that she had told the EEO investigator that the supervisor had made some sexually suggestive comments to plaintiff. The EEO manager disputed this testimony.<sup>120</sup>

The Sixth Circuit concluded that the jury was free to believe Grayson and disbelieve the EEO manager, and on that basis was free to base liability on the City's failure to take some disciplinary action against the supervisor.<sup>121</sup> Furthermore, the court ruled that the fact that plaintiff had left her job before notifying the defendant of her troubles was beside the point.<sup>122</sup>

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<sup>116</sup> *Id.* at \*2.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at \*4.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at \*5.



One is free to agree with the results of *Barna*, and free to demand a higher level of professionalism in investigations. However, doubts linger.<sup>123</sup> If we accept these results, are we saying that the employer may not trust in the judgment of trained and experienced employees when it comes to matters of credibility? Just because a jury resolves a credibility issue against a corporate investigator and against an employee witness, does that mean the employer's response was unreasonable?<sup>124</sup> Shouldn't the employee have to be more forthcoming about the details of the alleged harassment? Is an inconclusive investigation that does not support strong disciplinary action automatically defective? If so, does that mean that alleged harassers automatically have lesser rights than their alleged victims, and are to be disciplined on inconclusive evidence? Exactly what level of action would have satisfied the Sixth Circuit?<sup>125</sup> One thing, at least, is clear: The affirmative defense that the company investigated is overvalued. In any event, "management, not . . . [the] . . . investigator, should determine the most appropriate action to be taken in light of the facts available, which may be . . . inconclusive."<sup>126</sup> "All decisionmakers would be well-advised to read the actual interview notes, declarations or other statements, other important documents gathered during the investigation, and personnel files of critical witnesses if credibility is at issue."<sup>127</sup>

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<sup>123</sup> Many employers will not have the resources or a sufficient number of trained personnel to investigate claims as thoroughly and quickly as current case law seems to require. See generally Ruark, *supra* note 82, at 575.

<sup>124</sup> The employer knows the investigating employee, and may reasonably place considerable trust in the investigator's judgment and assessment of the credibility of the complainant, the alleged harasser, and other witnesses. But the investigating employee will be a stranger to the jury, and will be the focus of "plaintiff's onslaught to undermine [the] employer's *Ellerth/Faragher* affirmative defense." Van Detta, *supra* note 79, at 349-50.

[I]t . . . [is] . . . the dream of every employment lawyer [plaintiff's counsel] to have the opportunity to parade his or her opposing counsel before a jury to cross-examine him or her thoroughly and aggressively about everything that went behind the "polished" conclusion or "sanitized" final report that personifies the investigation to most employers.

*Id.* at 310. Of course, counsel as witness scenarios raise concerns under Model Rule 3.7 and Model Code DRs 5-101(B) and 102.

<sup>125</sup> For suggested alternative actions, see Nancy L. Abell, *Conducting an Effective Workplace Investigation*, VLR994 ALI-ABA 459, 501 (1999).

<sup>126</sup> *Id.* at 501.

<sup>127</sup> *Id.* at 500. In the authors' experience, it is sometimes difficult to get outside counsel to pay sufficient attention to the actual witness statements and other evidence documenting findings in reports of internal investigations.



The district court opinion in *Robinson v. Time Warner, Inc.*<sup>128</sup> is most instructive. In that case, an employee complained of racial discrimination in the workplace. The employer hired outside counsel, Levien, to conduct an internal investigation of the complaint. Levien apparently found no discrimination. When the plaintiff later sued under Title VII, he sought to depose and question Levien about the substance of his interviews with Time Warner employees.<sup>129</sup> Citing *Upjohn* and *Carter v. Cornell University*, the court ruled that the plaintiff was not entitled to question Levien or any Time Warner employee about the questions Levien asked or the answers provided during the employee interviews.<sup>130</sup> Moreover, the court ruled that the plaintiff was not entitled to any notes taken by Levien or his assistants, nor would he be allowed to review the final investigative report prepared by Levien.<sup>131</sup> Both the attorney-client and work product privileges had been properly invoked. Furthermore, since Time Warner had not raised the adequacy of the investigation as a defense, there was no waiver. Since it was Time Warner's position that the plaintiff had not been the victim of discrimination, it was not necessary for it to claim that it was somehow insulated from liability by the investigation. Time Warner had not put the adequacy of the report in issue.<sup>132</sup>

Again, the lesson seems clear:

[A]s the facts develop, the employer may not need to establish prompt remedial action, and will instead wish to keep all aspects of the investigation shielded by the attorney-client or work-product privileges. . . . Even though the client may later decide to waive the privilege, it will not have

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<sup>128</sup> *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144 (S.D.N.Y. 1999).

<sup>129</sup> *Id.* at 146. See discussion *supra* note 102 for the tactical reasons behind such fishing expeditions.

<sup>130</sup> *Robinson*, 187 F.R.D. at 146.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* The plaintiff also sought unsuccessfully, to claim waiver and obtain production of the materials under Federal Rule of Evidence 612 on the theory that Levien had reviewed the materials before attending a deposition. *Id.* at 147. It is worth noting that the evidence rules of many states differ from the federal rule. See, e.g., K.R.E. 612. For a case similar to *Robinson*, see *Sealy v. Gruntal & Co.*, No. 94 Civ. 7948, 1998 WL 698257, at \*5-6 (S.D.N.Y. Oct. 7, 1998) (by dropping a defense asserting the adequacy of the investigation, waiver could be avoided).

The possibility of "at issue" waiver can present a conundrum of pleading. Does Federal Rule of Civil Procedure 8(c), and a too-liberal view of at issue pleading mean that counsel must raise remedial action as a defense before counsel knows whether he or she wants to assert or waive the attorney-client privilege?



the luxury of making that choice if the privilege does not attach in the first instance.<sup>133</sup>

#### IX. WHAT ABOUT THE "OPEN RECORDS" PROBLEM?

Open records, or "sunshine" laws, are complicated, and vary from state to state. Counsel needs to be very careful in making too hasty a generalization about the applicability of such laws. Admittedly, some courts have given claims of attorney-client privilege and work product surprisingly short shrift in the absence of specific exceptions for them. Fortunately, in Kentucky, the applicable statute was amended in 1994 to make it clear that documents need not be provided under the open records law if they are covered by the privileges. Specifically, the statute provides that "no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery."<sup>134</sup> In other words, the work product rule contained in Kentucky Rule of Civil Procedure 26 provides an exemption under the open records law.<sup>135</sup> Furthermore, the statute provides that "The following public records are excluded [from the requirements of the open records law] . . . Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly."<sup>136</sup> Since the attorney-client privilege set forth in K.R.E. 503 (which incorporated *Upjohn*) was jointly enacted by the Kentucky Supreme Court and the General Assembly, K.R.E. 503 materials should be exempt from disclosure.<sup>137</sup>

In 1999, the Attorney General of Kentucky issued an opinion which ruled that materials relating to a sexual harassment complaint and

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<sup>133</sup> Goebel & Nickerson, *supra* note 71, at 28.

<sup>134</sup> K.R.S. § 61.878(1) (Michie1993).

<sup>135</sup> *Accord* OAG 95-ORD-18 (Kentucky Attorney General opinion). Unfortunately, the Kentucky Attorney General tends to construe this provision narrowly.

<sup>136</sup> K.R.S. § 61.878(1)(I).

<sup>137</sup> *See* Hahn v. Univ. of Louisville, No. 2000-CA-001296-MR, 2001 WL 815138, at \*3 (Ky. Ct. App. July 20, 2001) (unpublished and not final) (citing *UNDERWOOD & WEISSENBERGER*, *supra* note 67, at 503); *Meriwether v. Lexington-Fayette Urban Co. Gov't* No. 2000-CA-002050-MR, 2002 WL 10192, at \*2 (Ky. Ct. App. Jan. 4, 2002); *accord* OAG 97-ORD-66 (Kentucky Attorney General opinion). In Kentucky, at least, the legislature would probably not have the power to abrogate the attorney-client privilege. The court jealously guards its exclusive power to regulate the legal profession and formulate the rules of evidence.



investigation against an employee of Western Kentucky University had to be produced under the open records law upon the request of a newspaper reporter.<sup>138</sup> The opinion made no reference to the attorney-client privilege, perhaps because the University did not assert the privilege or structure its investigation in a way that would allow it to assert the privilege. The opinion noted the fact that the University "ha[d] exercised considerable circumspection in an attempt to shield the complainant and [the accused harasser] from public scrutiny,"<sup>139</sup> that important privacy interests were at stake, particularly since the complainant had not filed a lawsuit, and that disclosure would have a "chilling effect" on the University's ability to investigate complaints.<sup>140</sup> According to the opinion, none of this matters. No reference was made to the attorney-client privilege, nor to the Kentucky statute stating that documents need not be provided under the open records law if they are covered by privileges. Later, the opinion was ordered "Not To Be Published."<sup>141</sup>

This sort of confusion should be addressed by the Kentucky legislature. Appropriate statutory language can be found in other states. For example, a Florida statute dealing with university personnel records provides that:

(1) Each university shall adopt rules prescribing the content and custody of limited-access records that the university may maintain on its employees. Such limited-access records are confidential and exempt from the provisions of § 119.07(1). Such records are limited to the following:

....

(2) Notwithstanding the foregoing, any records or portions thereof which are otherwise *confidential by law* shall continue to be exempt from the provisions of § 119.07(1). In addition, for *sexual harassment investigations, portions of such records which identify the complainant, a witness, or information which could reasonably lead to the identification of the complainant or a witness are limited-access records.*<sup>142</sup>

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<sup>138</sup> OAG 99-ORD-39 (Kentucky Attorney General opinion).

<sup>139</sup> *Id.* at 6.

<sup>140</sup> *Id.* at 17.

<sup>141</sup> Paul Van Booven, Associate Counsel for the University of Kentucky, points out that some public agencies do not use lawyers to deal with their open records requests or denials, so the matter of privilege does not get raised. He is of the opinion that the privileges should be recognized in the open records context if they are properly set up and raised.

<sup>142</sup> FLA. STAT. ANN. § 240.253 (West 1998) (emphasis added).